

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today  
(1) was not written for publication in a law journal and  
(2) is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte WERNER KOTZAB

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Appeal No. 98-1984  
Reexamination Control No. 90/004,441<sup>1</sup>

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ON REQUEST FOR REHEARING

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Before KIMLIN, WARREN and WALTZ, Administrative Patent Judges.  
KIMLIN, Administrative Patent Judge.

REQUEST FOR REHEARING

Appellant requests rehearing of our decision of July 15,  
1998, wherein we affirmed the examiner's rejections of

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<sup>1</sup> Request filed November 4, 1996, for reexamination of U.S. Patent No. 5,427,720, granted June 27, 1995, based on Application 08/201,976, filed February 25, 1994.

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appealed claims 1-10 under 35 U.S.C. § 103.

Appellant makes reference to our finding at page 5 of the decision that appealed claim 1 is not limited to the use of a single sensor because the claim language "measured by at least one temperature sensor" encompasses a plurality of temperature sensors. Appellant maintains that the present invention has only a single temperature sensor, and that the claim language referring to "at least one temperature sensor" is not directed to the present invention, but "was intended to supply background" in the preamble of the claim (page 2 of Request). In order to clarify what appellant perceives "should have been a 35 U.S.C. § 112 rejection" (page 2 of Request), appellant has attached to the Request a proposed amendment of claims 1 and 9 and requests its entry.

As stated in our decision, we agree with the examiner that it would have been obvious for one of ordinary skill in the art to utilize only one temperature measurement to control the coolant pulses in light of the Evans disclosure. Therefore, our decision did not constitute a new ground of rejection under 37 CFR § 1.196(b) and prosecution is

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closed. Consequently, appellant's proposed amendment is untimely and this reexamination proceeding will not be remanded to the examiner for entry thereof.

Our statement regarding the claim language "at least one temperature sensor" was an additional reason for finding appellant's argument unpersuasive. We made no finding that claim 1 is indefinite. In our view, claim 1 encompasses utilizing one or more temperature sensors to measure the temperature during the first and second molding cycles while using a single sensor to control a plurality, but not all, flow control valves. Also, since the preamble of a Jepson claim sets forth a recitation of acknowledged prior art, and the preamble of claim 1 encompasses the use of only one temperature sensor, it would seem that the use of only one temperature sensor to measure the actual temperature during the first and second molding cycles was within the prior art. In re Fout, 675 F.2d 297, 299, 213 USPQ 532, 534 (CCPA 1982).

Appellant has also submitted "two declarations and accompanying tests" along with the Request. We presume that the "two declarations" referred to are the separate affidavits

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of Werner Kotzab and Dr. Bernd Reyer. However, inasmuch as prosecution of the present reexamination proceeding is closed, the affidavits are untimely and will not be considered by this merits panel.

Appellant also advances the argument that, unlike in the claims on appeal, Evans discloses that "the supply of regulating fluid to the mold is determined by a signal derived during an earlier cycle" (page 3 of Request). However, our review of the present record reveals that this argument was not presented in the principal and Reply Briefs on appeal. It is well settled that the failure on the part of an appellant to present an argument before the board prior to a request for rehearing constitutes a waiver of such argument. See In re Kroekel, 803 F.2d 705, 709, 231 USPQ 640, 642-43 (Fed Cir 1986). Accordingly, this argument of appellant is not properly before this board. However, we will offer the comment that it does not appear that the claim language "said plurality of flow control valves are triggered during each cycle . . ." requires that the plurality of valves are triggered in response to any particular signal, be it a signal

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generated during an earlier cycle or during the same cycle.

In conclusion, based on the foregoing, appellant's request is denied with respect to making any change in our decision. Also, we will not remand the reexamination proceeding to the examiner for consideration of the proposed amendment and affidavits attached to appellant's request.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

DENIED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
CHARLES F. WARREN	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
	)	
THOMAS A. WALTZ	)	
Administrative Patent Judge	)	

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Robert F. Conte  
401 North Michigan Avenue  
Suite 1700  
Chicago, IL 60611-4212

Requester:

Albert O. Cota  
5460 White Oak Avenue  
Suite A-331  
Encino, CA 91316